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Nos. 510, 511

In the Supreme Court of the United States

OCTOBER TERM, 1929

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, ET AL.

v.

SWANSON CHEMICAL CORPORATION

JAMES M. DORAN, PROHIBITION COMMISSIONER OF THE UNITED STATES, ET AL.

v.

MARTIN H. CASPER, TRADING AS DELMAR MANUFACTURING AND CHEMICAL COMPANY

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR APPELLANTS BELOW

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No. 510

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR for Eastern Pennsylvania, et al.

v.

SWANSON CHEMICAL CORPORATION

No. 511

JAMES M. DORAN, PROHIBITION COMMISSIONER OF the United States, et al.

v.

MARTIN H. CASPER, TRADING AS DELMAR Manufacturing and Chemical Company

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the District Court in No. 510 is not reported. A copy thereof will be found in an appendix to this brief (p. 25).

The opinion of the District Court in No. 511 is reported in 30 F. (2d) 400.

JURISDICTION

These cases are here on certificates under Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Case No. 510

In No. 510 the Circuit Court of Appeals certifies the following questions:

1. Is denatured alcohol, during its manufacture and preparation for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" may be issued for only one year?

If the answer to this question be in the negative, the court asks:

2. Does the provision of Section 6, Title II, of the National Prohibition Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to operate a denaturing plant, i. e., to use alcohol in the manufacture of denatured alcohol?

If the answer to the first question be in the negative and the answer to the second be in the affirmative, then the court asks:

3. Does a provision in a permit that it shall be in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for viola-

tion of the National Prohibition Act or regulations made pursuant thereto," comply with the above-mentioned requirement of Section 6 of Title II of the National Prohibition Act, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the first question be answered in the negative and if the second and third questions be answered in the affirmative, then the court further asks:

4. May a permit to operate a denaturing plant, which permit provides that it shall be in force "until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

This certificate presents the same questions as those involved in *Campbell et al.* v. *W. H. Long & Co., Inc.*, No. 445, now pending before this Court.

Case No. 511

In No. 511 the questions certified are as follows:

1. Does the provision of Section 6, Title II, of the National Prohibition Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to use specially denatured alcohol?

If the answer to this question be in the affirmative, the court asks:

2. Does a provision in a permit that it shall "be in effect until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the National Prohibition Act or regulations made pursuant thereto" comply with the aforesaid requirement of Section 6, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the answer to the first question be in the negative, or if the answer to the second be in the affirmative, than the court asks:

3. May a permit to use specially denatured alcohol in the manufacture of toilet preparations, which permit provides that it shall "be in effect until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the National Prohibition Act or the regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions and regulations involved in No. 511 are set forth in the appendix hereto (pp. 19–28). The statutory provisions and the regulations, together with a history thereof, involved in No. 510 are set forth in an appendix to Government's brief in Nos. 443, 444, and 445.

STATEMENT

Case No. 510

In No. 510 the Circuit Court of Appeals sets forth the following facts in its certificate:

On October 7, 1924, a permit authorizing the operation of a denaturing plant, the purchase and receipt of pure alcohol thereat, the denaturing thereof, and the removal therefrom of the denatured alcohol was issued to Swanson Chemical Corporation. The permit provided that it should be in effect " * * * from the date hereof until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the national prohibition act or regulations made pursuant thereto."

On October 1, 1927, Regulations 3, Treasury Department, Bureau of Prohibition, became effective. Article 95 of Regulations 3 provided that all permits to operate denaturing plants, in effect on October 1, 1927, should expire on December 31, 1928, unless renewed.

Pursuant to Article 95 the permittee, saving all rights it might have under its original permit, on August 14, 1928, filed an application for renewal. Following an investigation the Prohibition Administrator disapproved the application on the grounds that the applicant was not a fit person to be entrusted with a permit, that it had violated the terms of the National Prohibition Act, that it had sold the alcohol denatured by it under circumstances from which it or its officers might reasonably deduce the intention

of the purchaser to use the same for beverage purposes, and that it had assisted in the diversion of alcohol for beverage purposes. The permittee was advised that it might apply for a hearing upon its application for a renewal of its permit, but it refused to do so.

A bill in equity was thereupon filed by the permittee, Swanson Chemical Corporation, in the District Court for the Eastern District of Pennsylvania, asking for an injunction restraining the administrative officers from interfering with the carrying on of the business authorized by the terms of the original permit. An injunction was issued, and the defendants appealed.

It appears from the foregoing statement that the facts, as well as the questions of law, involved in this case are in all material respects the same as those in No. 445, now before this Court.

Case No. 511

In No. 511 the facts appearing in the certificate are as follows:

On March 23, 1923, a permit authorizing the use of specially denatured alcohol in the manufacture of toilet preparations was issued to Martin H. Casper. The permit provided that it "shall be in effect from the date hereof until surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the provisions of Title III of the national prohibition act or regulations made pursuant thereto."

On October 1, 1927, Regulations 3, Treasury Department, Bureau of Prohibition, became effective. Article 113 of Regulations 3 provided that all permits of the class issued to Casper, in effect on October 1, 1927, should expire on December 31, 1928, unless renewed.

Pursuant to Article 113, Casper, on August 28, 1928, filed an application for a renewal of his permit. Following an investigation the Prohibition Administrator notified Casper that his application had been disapproved on the grounds that he had not exercised his permit privileges in good faith and was not a fit person to be entrusted therewith. The permittee was advised that he might apply for a hearing upon his application for a renewal of his permit, but he refused to do so.

Casper thereupon filed a bill in equity in the District Court for the Eastern District of Pennsylvania asking for an injunction restraining the administrative officers from interfering with his permit privileges "unless and until the same shall have been revoked * * * pursuant to citation duly issued and hearing had thereon." An injunction was issued and the defendants appealed.

SUMMARY OF ARGUMENT

The facts and questions of law presented in No. 510 are substantially the same as those now before the Court in No. 445, *Maurice Campbell, etc.*, v. *W. H. Long & Co.*, and this Court's answers to the questions certified herein should be governed by its decision in that case.

No. 511 involves a permit to use specially denatured alcohol. Such a permit is to be distinguished from a permit to use liquor. The manufacture and use of liquor is governed by the statutory permit system. The *manufacture* of denatured alcohol requires the *use of alcohol* and is therefore also governed by the statutory permit system. Denatured alcohol, however, after having been manufactured and prepared for the market (for use) is expressly excluded from the provisions of the National Prohibition Act and is not to be treated as liquor. The use of denatured alcohol, and its alcoholic content, tax free, is controlled entirely by regulations. Permits may or may not be required. Having the authority to require permits, the administrative officers have the authority to provide for their revocation. Revocations are governed by regulations, and not by statute. Section 9 of Title II relates to the revocation of statutory permits. It has no relation to permits required solely by regulations. The power to issue regulations includes the power to repeal, amend, or modify such regulations. The promulgation of Article 113 of Regulations 3 was a valid exercise of that power.

If, however, it be held that Section 9 of Title II applies to the revocation of a permit to use denatured alcohol, Section 6 of Title II likewise has application. If Sections 6 and 9 have application the decision herein should be controlled by the decision in Nos. 443, 444, and 445, now before the Court.

ARGUMENT

I

THE ANSWERS TO THE QUESTIONS CERTIFIED IN NO. 510 SHOULD BE GOVERNED BY THE DECISION IN NO. 445 NOW BEFORE THE COURT

In No. 510 the Swanson Chemical Corporation held a permit to use alcohol in the manufacture of denatured alcohol. A like permit was held by W. H. Long & Co. in case No. 445, now before the Court on writ of certiorari granted December 2, 1929, and to be heard with Nos. 443 and 444, also involving permit questions. The facts in this case are substantially the same and the questions of law involved identical with those in No. 445. As these questions have been fully argued in the Government's brief on the merits in the above cases it is deemed unnecessary to repeat that argument here. The Government, therefore, refers to and adopts as its argument in this case the argument presented in those cases. It is submitted that the decision of the Court in No. 445 should control the answers to the questions certified in this case.

II

AFTER HAVING BEEN MANUFACTURED AND PREPARED FOR THE MARKET DENATURED ALCOHOL IS NOT AN INTOXICATING LIQUOR. ITS USE IS GOVERNED EXCLUSIVELY BY REGULATIONS

Number 511 involves a permit authorizing the use of specially denatured alcohol in the manufacture of toilet preparations. Obviously such a permit is not a permit authorizing the manufacture of liquor, and therefore the provision in Section 6, Title II, of the

National Prohibition Act, which directs that "all permits to manufacture * * * liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof" does not apply.

The preliminary question presented is whether the provision in Section 6 which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, applies to a permit to use specially denatured alcohol. If this provision of Section 6 applies, and the permit here involved is a "statutory" permit, it follows that the effect of Section 9 of Title II should be considered, and hence the answer to questions 2 and 3 herein would be governed by the answers to questions 3 and 4 in case Number 510.

But it is submitted that a permit to use denatured alcohol is not a statutory permit, that its issuance and revocation are governed entirely by regulations, and hence that Sections 6 and 9 of Title II have no application to the issuance or revocation of such a permit. If this view is sound, it follows that Section 9 is not a limitation upon the general powers of the administrative officers to terminate such permits unlimited in time by general regulations. The question thus presented is of great importance to the administrative officers in promulgating regulations governing the use of specially denatured alcohol, irrespective of the action taken in Numbers 443, 444, 445, and 510.

Section 600 of the Revenue Act of 1918, as amended by Section 900 of the Revenue Act of 1926, c. 27, 44

Stat. 9, 104 (U. S. C. App., Title 26, Sec. 245) places a tax on each proof gallon, or wine gallon when below proof, of distilled spirits manufactured in the United States.

Section 10, Title III, of the National Prohibition Act makes provision for the withdrawal and use of alcohol tax free in the manufacture of denatured alcohol. It further provides that "Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export." The provisions of Sections 10 and 11 of Title III are very similar to those contained in the Act of October 3, 1913, c. 16, Section IV, N, Subsec., 2, 38 Stat. 114, 199 (U. S. C., Title 26, Sec. 487), providing for the manufacture of alcohol free of tax for denaturation, the establishment of denaturing plants and the transfer thereto of alcohol, tax free, for denaturation, under the supervision of the Commissioner of Internal Revenue. This Act was an enlargement and continuation of the policy adopted by the Act of June 7, 1906, c. 3047, 34 Stat. 217 (U. S. C., Title 26, Secs. 481–486). It is clear that in enacting Sections 10 and 11 of Title III Congress intended to continue the policy adopted by these statutes.

In Section 4 of Title II it is provided that "after having been manufactured and prepared for the market" "denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force" shall not "be subject to the provisions of this Act." In explanation of this pro-

vision the Committee on Judiciary of the House in its report on this section (Report No. 91, 66th Cong., 1st Sess., H. R. Vol. 1) said:

> Section 4 of Title II makes provision for medicines, toilet articles, and flavoring extracts. The restrictions placed on these are less strict than like restrictions in many of our States, and are believed to be as liberal as it is safe to make them. *No doubt the present policy pursued by the Commissioner of Internal Revenue with regard to these preparations will be continued. We are assured that there is nothing in the restrictions contained in this bill that will necessitate a change in that policy, and it is believed that the restriction should not be made less stringent.* (Italics ours.)

The provisions of Section 4 and the report of the Committee indicate that it was intended that the use of denatured alcohol should in the future, as in the past, be controlled entirely by regulation free of statutory restrictions.

Under the Acts of 1906 and 1913, *supra*, the method of controlling the use of denatured alcohol so as to protect the revenue and prevent the diversion of the alcohol to illegal purposes was left entirely to the discretion of the administrative officers. Under those Acts Regulations 30, Revised, United States Internal Revenue, effective October 12, 1917, were promulgated. Under Regulations 30, those using *completely* denatured alcohol were not required to pro-

cure permits (Articles 60, 61, 80); those using specially denatured alcohol were. (Articles 77–90.) Permits to use specially denatured alcohol were issued to those in whom the Department had confidence. (Article 79.) Permits issued were limited in amounts and expired when the amounts specified had been withdrawn. Provision was made for renewal of such permits. (Article 79b.)

We submit that it was clearly the intention of Congress in enacting the National Prohibition Act to continue the policy of regulating the use of denatured alcohol by regulations and to control the use of such alcohol by flexible regulations which could be made adaptable to constantly changing conditions and the rapid development of new chemical processes. It will be observed that under Section 10 of Title III alcohol may be procured tax free only under regulations prescribed by the administrative officers. Section 13 of Title III directs the Commissioner to issue regulations "from time to time * * * which may be *necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses,* * * *." (Italics ours.) A regulation issued under this section has the force and effect of law. *Selzman* v. *United States*, 268 U. S. 466.

At the present time, no permit is required as a condition to one's right to procure completely denatured alcohol. (Article 88, Regulations 3, Revised, Treasury Dept., Bureau of Prohibition, effective October 1, 1927.) The appellee holds a permit

to use specially denatured alcohol. Such a permit is required by the provisions of Articles 88, 112 and 113 of Regulations 3. The statute makes no distinction between completely denatured alcohol and specially denatured alcohol. That the administrative officers have authority to authorize the use of completely denatured alcohol without a permit will hardly be questioned. If they may permit such use of completely denatured alcohol, they could likewise, so far as the statute is concerned, authorize such use of specially denatured alcohol, if in their discretion they determined that no permit was necessary, advisable or proper to secure the revenue or to prevent the diversion of such alcohol to illegal uses.

No one can obtain a vested right to secure alcohol tax free. See *Dunlap* v. *United States*, 173 U. S. 65. Nor can one obtain a vested right to the use of alcohol. See *Mugler* v. *Kansas*, 123 U. S. 623; *Everard's Breweries* v. *Day*, 265 U. S. 545. If, therefore, a method of denaturation should be discovered which would produce a denatured alcohol as fully denatured as that now classified as completely denatured alcohol and yet be adaptable to the uses for which specially denatured alcohol is now authorized, the administrative officers could, under the provisions of Sections 10 and 13, decide that the requirement to secure permits to use specially denatured alcohol was no longer necessary. The effect of such action would be to wipe out all existing permits. They would become a nullity. If thereafter a method

of reclaiming alcohol so denatured were to be discovered, the administrative officers could again require permits to use specially denatured alcohol.

If new processes of reclaiming denatured alcohol should make it impracticable at any time for the administrative officers to protect the revenue and prevent diversion under the regulations then in force, such officers could abolish the regulations and with them the permits outstanding, and require new permits to meet the changed conditions. These are matters falling within the administrative discretion of the officers charged with the enforcement of the Act, and no recourse to the courts could be had. (*Williamsport Co.* v. *United States*, 277 U. S. 551, 562; *United States* v. *Williams*, 278 U. S. 255, 257–258; *Dunlap* v. *United States*, 173 U. S. 65.)

Likewise, the administrative officers, having the power under the provisions of Section 10 to prescribe the denaturants which shall be added to alcohol in the manufacture of denatured alcohol, may at any time, in order to meet new conditions, change the ingredients of specially denatured alcohol and thereby render it unfit for some of the uses to which it is now adaptable.

If the administrative officers have the foregoing power, then it is manifest, we submit, that the use of specially denatured alcohol is controlled entirely and exclusively by regulations, and hence that Section 9, Title II, is in no sense a limitation upon the powers of such officers to terminate permits by general regu-

lation. The general term "any person who has a permit," as used in Section 9 of Title II, must be limited to those who come under the statutory permit system. See *United States* v. *Katz* (271 U. S. 354, 361–362).

It should be noted that the statute confers a limited right to use alcohol for certain purposes. It gives no right to use any particular kind of denatured alcohol or to secure the alcohol tax free.

It is accordingly submitted that aside from and in addition to the questions presented and considered in our brief in cases Nos. 443, 444, and 445, the administrative officers have the power under the statute to permit or preclude the use of denatured alcohol manufactured according to specified formulae; to change those formulae; to require permits to use denatured alcohol; to dispense with those requirements, and to terminate such permits by general regulations affecting all of a given class. If this be true, it is manifest that Article 113 of Regulations 3 is a valid regulation, and that appellee Casper's permit terminated on December 31, 1928, as the regulation provided. The third question certified should, therefore, be answered in the affirmative.

But if it be held that Section 9 of Title II applies to the revocation of a permit to use denatured alcohol, then Section 6 of Title II likewise applies. If Sections 6 and 9 apply, then the decision herein should follow the decision of the Court in Nos. 443, 444, and 445.

CONCLUSION

The questions certified in No. 510 should be answered as follows:

(1) The first, second, and fourth questions should be answered in the affirmative.

(2) The third question should be answered in the negative.

The questions certified in No. 511 should be answered as follows:

(1) The third question should be answered in the affirmative.

(2) If the third question be answered in the affirmative, the first and second questions need not be answered. If, however, the third question be answered in the negative, then the first question should be answered in the affirmative, and the second in the negative.

Respectfully submitted.

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APRIL, 1930.

APPENDIX

The National Prohibition Act, c. 85, 41 Stat. 305:

TITLE II

SEC. 1. When used in Title II and Title III of this Act (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *

* * * * *

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. * * * (U. S. C., Title 27, Sec. 4.)

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (U. S. C., Title 27, Sec. 12.)

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of

this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

* * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor * * *. (U. S. C., Title 27, Sec. 13.)

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further*, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor.

No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof. (U. S. C., Title 27, Sec. 16.)

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so

correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor * * *.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in Section 4 of this Title, his permit to manufacture and sell such article shall be revoked. * * * (U. S. C. Title 27, Sec. 14.)

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named * * * at which time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

TITLE III

SEC. 10. Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is

authorized to be used, unfit for use as an intoxicating beverage.

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export. * * * (U. S. C., Title 27, Sec. 80.)

SEC. 11. Alcohol produced at any industrial alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

* * * * *

But any person permitted to obtain alcohol tax free * * * shall first apply for and secure a permit to purchase the same and give the bonds prescribed under title II of this Act * * *. (U. S. C., Title 27, Sec. 81.)

SEC. 13. The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of * * * denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products. (U. S. C., Title 27, Sec. 83.)

Regulations 2, Treasury Department, Bureau of Prohibition, effective October 1, 1927:

SEC. 10. (*l*) *"Liquor" or "intoxicating liquor"* shall be construed as defined in section 1, Title II, of the act; but the articles enumerated in section 4 of the act, after having been manufactured and prepared for the market shall not be deemed included within the word "liquor" or the phrase "intoxicating liquor" as used herein, if such articles correspond with the description and limitations stated in said section 4.

Regulations 3, Treasury Department, Bureau of Prohibition, revised, effective October 1, 1927:

ART. 95. * * *.

Permits issued to operate denaturing plants in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year; and if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

ART. 113. * * * Permits to use specially denatured alcohol in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year; and, if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

In the District Court of the United States for the Eastern District of Pennsylvania

Sitting in equity

No. 4895. December Term, 1928. Bill for Review

SWANSON CHEMICAL CORPORATION

v.

JAMES M. DORAN, ET AL.

OPINION

Sur Trial Hearing on Pleadings and Proofs

DICKINSON, *J.*: This case began as a motion for a preliminary injunction. The hearing was by stipulation expanded to one on final decree. The underlying question is that which, so far as this Court is concerned, has been answered in the case of *Del Mar Manufacturing and Chemical Company* v. *Doran, et al.*, which was heard at the same time as the instant case. The defendants differentiate this from the *Del Mar case* in that the plaintiff here holds a permit not for an alcoholic nonbeverage product but a "liquor" permit in that it may sell either or both alcohol or alcohol as a denatured product. There is, of course, a difference in fact between the manufacture of an alcoholic nonpotable product, in the manufacture of which denatured alcohol is an ingredient, and a manufacture of denatured alcohol itself. There would not seem, however, to be any difference in the permit classification because both are listed among "articles" enumerated in Section 4 of Title II of the National Prohibition Act.

The two classes of products, if they may be called such, would thus seem to have the like permit. A

differentiation, it is true, is made between the first four "articles" and the remaining two, but this differentiation is for a wholly different purpose than that of permit regulation. It is likewise true that this differentiation is based upon the fact difference that the "articles" enumerated in the first four classifications may readily be made potable. The truth remains, however, that a manufacturer of denatured alcohol and a manufacturer of flavoring extracts have the same permit rights under Section 4 of the Act.

The defendants' answer to this is, as we understand their position, "that a permit to operate the denaturing plant carries with it the right to buy and sell ethyl alcohol and that the defendant (evidently intended for plaintiff) has continually bought and sold ethyl alcohol under and by virtue of its permit."

We are constrained to confess that we do not understand this branch of the defense. Its position at the tail end of the answer gives the impression of the afterthought of a mere make weight comment. The real defense is that in the view of the defendants they may impose the time limit duration of a year upon all permits to produce the "articles" enumerated in Section 4.

This very question would seem to be the same sought to be raised on the motion for a preliminary injunction disposed of in the decree of this Court under date of February 18th, 1926. It is true that the defendants then conceded that upon the fact merits of the application for a permit the plaintiff had the right to one and that a decree requiring the permit to issue should properly be entered. They asked the Court to pass upon the abstract power of the Commissioner to adopt a regulation limiting per-

nits in such cases to a year. It is likewise true that the Court refused to pass upon this question because it did not arise in the case but the question would seem to be the same, and we are unable to discover in the answer anything more than the raising of the very question which has been ruled in the *Del Mar case*. It is always helpful in any discussion to have a frank avowal of what the real question under discussion is.

In the *Ma-King* and other cases the Courts have ruled in practical effect that on applications for original permits the Commissioner is called upon to exercise his executive or administrative judgment of whether a permit should issue and upon the question of issue the Courts have granted him what is practically the right to exercise his discretionary judgment. After, however, a permit had been granted the Commissioner can revoke it only in the manner prescribed by the Act of Congress and the judgment there exercised is not an executive or administrative judgment but is a judicial judgment, the basis of which is a fact finding. The defendants are strongly impressed with the value to them of the lawful power to exercise at least once a year an executive or administrative control over permits so that they may escape the need to resort to a judicial fact finding. This is the very power, however, which we have held the defendants do not possess. If the permit here is one to manufacture or sell "liquor," no regulation limiting its operation to a year is needed, because Section 6 expressly so limits it by law.

The only question before us thus becomes whether the permit in question is the one permit or the other. This is in one view a question of law and in another view a question of fact. We assume the stipulation

at Bar to include that the Court is to determine the character of the permit from the records which are before the Court. We begin with the application under date of January 15, 1924, which is an application for a permit to operate a denaturing plant under the provisions of Title III of the National Prohibition Act. This is followed by the issuance of a permit under date of October 7th, 1924, which authorized the operation of a denaturing plant, and incidentally that it should continue until revoked in accordance with the law.

The ruling made is that the permit in question, so far as the rights of the permittee are concerned, is in the same class with the permits granted to manufacturers of the other "articles" enumerated in Section 4, and that in consequence the decree prayed for should be granted.

A formal decree is filed herewith.

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